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Chairman: Mr. LEHMANN (Denmark)

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AGENDA ITEM 143: REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE WORK OF ITS TWENTY-EIGHTH SESSION

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The meeting was called to order at 10.30 a.m.

AGENDA ITEM 143: REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE WORK OF ITS TWENTY-EIGHTH SESSION (A/50/17 and 434)

1. Mr. GOH (Chairman of the United Nations Commission on International Trade Law (UNCITRAL)), introducing the report of UNCITRAL on the work of its twenty-eighth session, said that the session had been marked by the adoption of the draft Convention on Independent Guarantees and Stand-by Letters of Credit. The instruments dealt with in the draft were designed to protect beneficiaries from the risk of non-performance of a contractual obligation. The commercial utility of such instruments had been increasing steadily over the past 30 years. The need to promote a uniform approach to them at the international level was clearly recognized. The work of the International Chamber of Commerce in that area was limited to assisting parties in arranging their contractual relationships with regard to those instruments, as opposed to establishing substantive law. The draft Convention aimed to provide a degree of uniformity and clarity in that important area of economic activity. In particular, it established rules of substantive law governing two aspects that were of central importance to the commercial utility of those instruments: the independence of the undertaking from the underlying transaction, and the establishment of rules that would apply in instances of fraudulent calling of the undertaking. The independence of the undertaking was important because the issuer should not have to investigate the facts of the underlying transaction when a demand was made. It was also important to combat the potential for fraudulent calls because, often, only a statement by the beneficiary was required to trigger payment. The draft Convention aimed to provide certainty in that area by establishing uniform rules that would apply in cases of fraudulent calls, including with regard to the requirements for the granting of injunctive relief. The draft also dealt with such issues as the form and content of the undertaking and the rights, obligations and defences of the parties. It provided rules offering a necessary degree of uniformity and certainty which should greatly enhance the viability and utility of those instruments in international commercial transactions. It was another useful addition to the work done by UNCITRAL, particularly in the area of payments. With regard to the process of adoption of the Convention, UNCITRAL had recommended that, rather than having recourse to a diplomatic conference, the Sixth Committee should consider the Convention and recommend it to the General Assembly for adoption at the current session. It was his understanding from the Committee's programme of work that that would indeed be the case.

2. The purpose of the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication was to facilitate the use of modern means of communication in international trade. The electronic exchange of what had traditionally been paper-based commercial information was inconceivable without a high degree of standardization and harmonization, not only in the technological field but also in the legal field. Legal standardization should try to solve problems that arose in parallel with technical issues: the contractual relationship between parties that exchanged EDI messages directly, and the statutory legal framework which should serve for all trading partners that used or were affected by EDI. Contractual rules

differed from country to country, for example with respect to the definition of "writing". National legal frameworks often could not provide satisfactory answers to the questions that arose in connection with the increasing use of EDI. The existing legal rules were even, at times, considered to be an obstacle to the implementation of EDI. That was why UNCITRAL had set to work to develop a set of basic rules in the form of a model law. The method chosen by its Working Group on Electronic Data Interchange had been to analyse the functions performed by traditional, paper-based means, such as writings, signatures and original documents, with a view to establishing ways in which similar functions could be performed in an electronic environment. UNCITRAL has made significant progress in its consideration of the draft Model Law but, having only had time to consider articles 1 and 3 to 11 in full, had decided to place it on the agenda of its next session.

3. During the preparation of the draft Model Law, the Commission's attention had been drawn to the "re-engineering" of the Working Party on the Facilitation of International Trade Procedures (WP.4) currently under way within the Economic Commission for Europe. Although a subsidiary body of a regional commission, the Working Party was responsible for the development of UN/EDIFACT messages and was thus an important contributor to the development of EDI world wide. UNCITRAL members had expressed concern as to a possible conflict with the Commission's general mandate as the core legal body in the field of international trade law within the United Nations system. He was pleased to report that the Working Party had clarified its intentions in a document published after the close of the UNCITRAL session, which seemed to offer new prospects for cooperation between UNCITRAL and the community of EDI users represented in the Working Party. That new document (TRADE/WP.4/R.1141) rightly pointed out that the Working Party should play an active role in identifying the legal constraints to the development of EDI and in proposing directions in which practical solutions should be sought. It seemed to recognize, however, that the drafting of the legal rules that might be necessary as a result should be carried out by other bodies such as UNCITRAL. He was confident that close cooperation between UNCITRAL and the Working Party could lead to significant progress in the legal acceptability of electronic means of communication, for the greater benefit of international trade.

4. UNCITRAL had had before it a revised version, prepared by the secretariat, of the draft Notes on Organizing Arbitral Proceedings. There had been wide and strong support in the Commission for the draft Notes, which should help to avoid surprises and misunderstandings in arbitral proceedings and to make such proceedings more efficient, particularly in international cases. Nevertheless, reservations had also been expressed about the draft. It had been said that experienced arbitrators did not need the advice given in the draft Notes, while those without sufficient experience would not be able to rely on them for comprehensive guidance on how to conduct arbitrations. Moreover, if the arbitral tribunal were to present the Notes to the parties, that might lead to unnecessary discussions about matters relating to the organization of proceedings, and a party might invoke the Notes in order to insist on the holding of such discussions. The Notes might thus make arbitral proceedings more complex.

5. UNCITRAL, however, remained convinced of the usefulness of the Notes and had specifically approved the following principles: the Notes should not impinge on the beneficial flexibility of arbitral proceedings; the Notes should not establish any requirement beyond existing laws, rules or practices and, in particular, should ensure that the fact that the Notes, or any part of them, had been disregarded would not lead to the conclusion that any procedural principle had been violated; and, lastly, the Notes should not seek to harmonize disparate arbitral practices or recommend the use of any particular procedure.

6. Having completed the review of the substance of the draft Notes, UNCITRAL had envisaged that it would approve a revised draft of the Notes at its twenty-ninth session. The Notes would be a useful addition to the Commission's other texts in the area of arbitration.

7. With regard to future work, and particularly the question of receivables financing, the Commission had had before it a secretariat report intended to help it to determine whether it was possible to continue work in that area. That report had concluded that it would be desirable and possible for UNCITRAL to prepare a set of uniform rules the purpose of which would be to remove obstacles to receivables financing arising from the uncertainty existing in various legal systems as to the validity of cross-border assignments and the effects of such assignments on the debtor and on other third parties.

8. UNCITRAL had expressed support for work on the topic. It had been of the opinion that such work could facilitate international trade, since assignment was one of the most important transactions in the financing of international trade. It had therefore decided to assign the secretariat report and the draft uniform rules contained in it to a working group with a view to preparing a uniform law on assignment in receivables financing. While under its mandate it should play a particularly active role in receivables financing, it had stressed the necessity of continued cooperation with UNIDROIT and other organizations active in that field. As to the form that work by the Commission could take, while it was recognized that the matter would need to be addressed at a later stage when the content of the uniform rules would be better known, the prevailing view was in favour of preparing a model law.

9. With regard to cross-border insolvency, the Commission had considered a report on the UNCITRAL-INSOL Judicial Colloquium (Toronto, 22 and 23 March 1995) on that issue. The experience and viewpoints presented at the Colloquium reflected the general desire of judges to cooperate in cross-border insolvency cases and their interest in that regard, but also the fact that such cooperation was often hindered by disparity or inadequacy of law. In view of the conclusions of the Colloquium, it had been decided that it would be worthwhile for UNCITRAL to attempt to provide a legislative framework to limit uncertainty in settlement of cross-border insolvency cases, for example, by drawing up model legal provisions and incorporating provisions on access and recognition in the text that it prepared. The Commission had therefore decided to assign to a working group the task of developing a model legislative framework for judicial cooperation and for access and recognition. Some members considered, however, that the cross-border aspects of insolvency should not take a higher priority than other questions that might be the subject of future work.

10. With regard to build-operate transfer (BOT) projects, it was noted that, due to a number of factors, in many countries, the number of BOT projects under way had increased substantially. However, in spite of the advantages and prospects offered by such projects, a number of practical obstacles of a legal character might hinder them. Some of those obstacles might arise because of the lack of a legal and regulatory framework to attract long-term private-sector involvement. It had therefore been proposed that UNCITRAL should envisage assisting States in alleviating them. However, in view of the fact that the practice with regard to BOT was still developing, the Commission had decided that it would be useful to provide the secretariat with the opportunity to further study the issues proposed for further work. It had therefore requested the secretariat to study further the issues proposed for future work, with a view to facilitating discussion of the matter at the Commission's twenty-ninth session.

11. With regard to case law on its texts, the Commission had appreciated the efforts put into developing the case collection system, in particular because of its importance in promoting uniform interpretation of the Commission's texts, which was an important aspect of its mandate. However, it had noted that the secretariat's work would substantially increase as the number of decisions and rewards covered by CLOUT increased. It had therefore requested that adequate resources should be made available to the secretariat for the effective operation of the systems.

12. The activities of the UNCITRAL secretariat in the area of training and technical assistance had continued to increase. That could be seen mainly from the list of seminars, colloquiums and briefing missions held since the last session, which was contained in its reports. The secretariat had taken measures to strengthen cooperation and coordination with other bodies, both inside and outside the United Nations system, with a view to providing training and technical assistance in international trade law. The Commission had therefore expressed its satisfaction and renewed its call for the continuation and strengthening of cooperation and coordination among entities providing legal technical assistance, with a view to ensuring that, when United Nations system entities or outside entities provided such assistance, the legal texts formulated by the Commission and recommended by the General Assembly to be considered were in fact so considered and used. However, the secretariat could not implement training and technical assistance plans unless sufficient contributions were paid into the UNCITRAL Trust Fund for Symposia and the necessary human resources were provided to it, which was not the case at present. UNCITRAL had therefore decided to request that the Fund be placed on the agenda of the pledging conference taking place within the framework of the General Assembly session, on the understanding that that would not have any effect on the obligation of a State to pay its assessed contribution to the Organization. The Commission had also renewed its call that it should be provided with the necessary human resources to meet the need for its training and technical assistance activities. It had expressed its appreciation to those States and organizations that had contributed to the Commission's programme of training and assistance by providing funds or staff or by hosting seminars.

13. The Commission had also considered the status of signatures, ratification, accessions and approvals of conventions that were the outcome of its work. As

it had indicated in its report, new instruments of accession, ratification or succession had been deposited by various States, and its arbitration model law had been adopted by four additional States since its twenty-seventh session.

14. Mr. LEONI (Brazil) expressed satisfaction that the Working Group on International Contract Practices had concluded the preparation of the draft Convention on Independent Guarantees and Stand-by Letters of Credit, which the Brazilian Government believed was a valuable legal instrument for universal use.

15. The legal aspects of electronic data interchange (EDI) was another important subject; accordingly, UNCITRAL should continue its work on the draft Model Law on that subject with a view to finalizing the text at its next session and should adopt the draft Guide to Enactment of the Model Law.

16. His delegation was pleased that an entirely revised draft of the draft Notes on Organizing Arbitral Procedures had been prepared as a result of the Twelfth International Arbitration Congress. The draft Notes, which constituted a recapitulation of questions relating to arbitration, might facilitate arbitral proceedings by helping to avoid surprises and misunderstandings that might arise from the diversity of legal systems.

17. With regard to receivables financing his delegation agreed with the conclusion formulated in the secretariat's report: it would be both desirable and possible to prepare a set of uniform rules to eliminate a number of the problems that arose, in particular regarding the validity of cross-border assignments and their effects on the debtor and on third parties. In that regard, his delegation welcomed the fruitful cooperation that had been established by the secretariat with national and international organizations working in that area.

18. The work of the UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency had been very valuable. The development of a model legislative framework for judicial cooperation and for access and recognition could be assigned to a working group.

19. As stated in the secretariat's note, the preparation by UNIDO of Guidelines for the Development, Negotiating and Contracting of Build-Operate-Transfer (BOT) Projects had reached an advanced stage. The BOT project-financing mechanism had aroused considerable interest and the Commission's work in that area would certainly assist States in tackling the legal problems that had been identified.

20. His delegation noted with appreciation the publication of three additional sets of abstracts in the Case Law on UNCITRAL Texts (CLOUT) series, as well as the continuing provision by the Commission of training and assistance which was helping to raise awareness of UNCITRAL legal texts.

21. Mrs. WILSON (United States of America) said that the Sixth Committee should recommend to the General Assembly the adoption of the draft Convention on Independent Guarantees and Stand-by Letters of Credit in its present form, avoiding the expense of a conference which, given the balance achieved in the text between the concepts and procedures specific to the various legal systems, could not be justified. No further deliberation on the substance was necessary.

22. The Commission's work on the preparation of a draft Model Law on electronic data interchange (EDI) was also very important, since experience had shown that the use of new technologies necessitated the adoption of new rules.

23. At its next session, the Commission was to complete its consideration of the draft Notes on Organizing Arbitral Proceedings, which the United States believed would be very useful. The Notes were not intended to be mandatory but to facilitate the task of arbitrators and to keep them abreast of developments in international arbitration.

24. Her delegation wished to make several preliminary observations on the four new projects in the Commission's work programme: with regard to the question of cross-border insolvency, the United States commended the secretariat for its careful examination of the issues and for having sought the views of practitioners and other interested groups whose proposals were likely to be practical and easy to implement.

25. Her delegation endorsed the Commission's decision to entrust to a working group the task of considering the advisability of developing rules on the negotiability of EDI transport documents, particularly maritime bills of lading, and on the use of electronic registries.

26. Like many other countries, the United States saw build-operate-transfer (BOT) projects as an important source of funding, particularly for developing countries. Such projects were an appropriate topic for the Commission, which should first identify the areas which could benefit from its contribution, including those in which it could build on its previous work on international construction contracts, countertrade and, most recently, model laws on the procurement of goods, construction and services.

27. The usefulness of the work which UNCITRAL intended to undertake on receivables financing was not in doubt, but the Commission must take into account the work being done on that topic by other international bodies such as UNIDROIT, in order to avoid overlapping and contradictions in the resulting texts.

28. It was equally important that other bodies within the United Nations system should not assume a primary role in the development of norms of international trade law since, as the General Assembly had stated repeatedly, that role belonged to UNCITRAL.

29. Mr. ENAYAT (Islamic Republic of Iran) said that the task of harmonizing and unifying international trade law was very important since, as the Secretary-General had stated in his report on the work of the Organization (A/50/2, para. 111), "the success of economic and social reforms currently under way in many States depends on the adoption of adequate laws that facilitate international trade".

30. His delegation welcomed the completion of work on the draft Convention on Independent Guarantees and Stand-by Letters of Credit, although it felt that it would have been preferable if the draft articles had taken the form of a model law rather than an international convention. A model law would have given

States more time and flexibility to review their national legislation in the light of the provisions adopted.

31. His delegation also appreciated the efforts made to complete the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication and hoped that the draft Model Law, together with the draft Guide to Enactment of the Model Law, would be completed at the Commission's twenty-ninth session.

32. With regard to future work, his delegation supported the preparation of a study on the negotiability and transferability of EDI transport documents, with particular emphasis on maritime transport documents. However, it believed that the Working Group should also consider legal issues arising in the context of the relationship between EDI users and service providers such as electronic communications networks.

33. His delegation welcomed the preparation of the draft Notes on Organizing Arbitral Proceedings, which, in addition to their scientific value, would be of great assistance to practitioners. Nevertheless, it felt that it would be preferable to entrust the revision of the Guidelines to a working group. Furthermore, the Commission should weigh any decisions carefully, rather than simply endorsing the work done by other bodies.

34. With regard to the legal aspects of receivables financing, his delegation endorsed the Commission's recommendation to refer the draft uniform rules to a working group and to emphasize cooperation with other organizations dealing with the same topic.

35. The debate on the Commission's future work reflected a trend towards focusing on topics of practical interest. In that connection, his Government welcomed the Commission's decision to take up the topic of build-operate-transport (BOT) projects.

36. On the issue of cross-border insolvency, there was a need to explore the possibility of developing legal mechanisms to reduce conflicts between domestic legislation and to focus on the question of judicial cooperation in that area.

37. His delegation noted with satisfaction that UNCITRAL had organized various symposia and seminars which had been very useful for developing countries. There was no doubt that the training and technical assistance provided by UNCITRAL contributed greatly to enhanced understanding and use of the texts prepared by the Commission.

38. With regard to the status and promotion of UNCITRAL legal texts, document A/CN.9/416 gave a complete account of the Commission's work and its international acceptance. In his country, the UNCITRAL Model Law on International Commercial Arbitration of 1985 had served as the basis for the rules on commercial arbitration of the Iranian Chamber of Commerce, and a draft bill reproducing the underlying principles of the Model Law had recently been submitted to Parliament.

The meeting rose at 12.10 p.m.